

Dr Charles Knight

**Submission to the Senate Foreign Affairs, Defence and Trade Legislation Committee
concerning the Defence Legislation Amendment (Enhancement of Defence Force Response
to Emergencies) Bill 2020**

I am a 'late life' academic, an adjunct senior lecturer in terrorism and security studies at Charles Sturt University. My current research focuses on military operations in urban areas and amongst populations. My PhD research originated in the psychological phenomenon of how US decision-making shifted beyond 'bounded rationality' (see Prof David Kilcullen's work) in the wake of 9/11 and is a study of the conditions under which repressive policies and actions do or do not deliver intended results during counterinsurgency. I have over 40 years of military full-time and reserve service and have served with several armed forces. I continue to serve as an Australian Army reservist, but do not make this submission in that capacity.

I write to express concern that the subject legislation, as currently drafted, is potentially harmful to the relationship between the Australian Defence Force and the Australian public. I also believe that appropriate redrafting would address this concern without compromising the likely purposes of the bill.

The crux of my concern is that the proposed departure from existing arrangements threatens an important element of public confidence in the apolitical status of the ADF. This is the belief that it cannot readily be used to police (ie control, constrain or limit) political protest or industrial action. This is distinct from employment to mitigate the effects of industrial action by substitution, for which the ADF clearly can and has been used.

I do not resile from the uncomfortable Hobbesian reality that the ADF exists to apply force, nor that in certain circumstances the use of force can and should be available domestically. Nevertheless, worldwide, virtually every significant case of widespread political violence since 1946 has been accelerated by military or paramilitary use of force considered outrageous by a significant proportion of a relevant population. It is essential that any use of force is perceived as necessary, legitimate and in accordance with previously understood norms. The question of the limited circumstances under which Parliament, acting as society's agent, considers force is legitimate should be addressed in the bill. Historical practice limiting domestic military use of force to certain defined circumstances and under the authority of a member of the judiciary has merit.

The perceived or actual lack of transparency and oversight in the proposed new arrangements is problematic. Combined with a failure to either limit the scope of ADF use of force or define emergencies where force may be used, the effect of the legislation is of seeming to provide unfettered and potentially sinister power. Progressive commentators

are certainly articulating this view on social media. While it may seem unlikely that such power would be inappropriately exercised, the apparent scope for abuse delivers credibility to critical and divisive narratives which paint the ADF as a threat to democratic norms. There appears to be significant potential for political and ideological adversaries to use this perspective to escalate tension in a crisis. The provision for members of foreign militaries or police forces to be employed in undefined emergencies, without excluding public order situations is particularly unfortunate. In sum, this legislation might set back the way in which the ADF is held in high regard by almost all sections of Australian society.

I suggest that the bill might be amended to constrain the use of force, conceptually along the lines of what is written below. I acknowledge that the form of words will need further development to align with other relevant legislation.

Indicative wording

Under the provisions of this bill.

- The use of force by the ADF, up to and including lethal force, exercised under the sole authority of the Minister as described in this bill, may only be in response to an immediate threat to life or limb and where there is no other way of preventing that threat occurring/developing.
- The use of force by the ADF, up to and including lethal force, may otherwise only be exercised under the dual authority of the Minister, and (an appropriately defined) member of the judiciary of the jurisdiction of the place where force is to be used. That use of force is limited to actions the member of the judiciary authorises in writing and is a response to
 - an unequivocal intention to cause death or serious injury, and then only to the level required to prevent or end the threat
 - wilful or reckless behaviour that if continued presents a health and safety threat to the community or population at large, and then only to the level required to end the threat and only after any feasible warnings have been given
 - response to prevent widespread, direct and wilful destruction of certain (to be defined) kinds of property, and then only after warnings have been given
- The use of force by the ADF is not authorised to police (control, constrain or limit) any form of political protest, industrial action or similar disruption that does not meet the above thresholds. This clause specifically excludes the use of the ADF to end or prevent political protest, industrial action or similar disruption even when such actions indirectly interfere with services or utilities in a way that incidentally represents a wider health and safety threat. This does not prevent the ADF being used to deliver those services or utilities.